

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS
SHERMAN OSBORN**DEFENDANTS**
BNSF Railway Company

(b) County of Residence of First Listed Plaintiff Box Butte County
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant Lancaster County
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number)
Jeanelle R. Lust, Knudsen, Berkheimer, Richardson & Endacott, LLP, 3800
VerMaas Place, Suite 200, Lincoln, Nebraska, 68502, Phone: (402)
475-7011

Attorneys (If Known)
Melanie J. Whittamore-Mantzios, Wolfe, Snowden, Hurd, Luers &
AHL, LLP, Wells Fargo Center, 1248 "O" Street, Suite 800, Lincoln,
Nebraska, 68508, Phone: (402)474-1507

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
☐ 2 U.S. Government Defendant
☒ 3 Federal Question (U.S. Government Not a Party)
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|--|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated <i>or</i> Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated <i>and</i> Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input checked="" type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
☐ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Reinstated or Reopened
☐ 5 Transferred from another district (specify)
☐ 6 Multidistrict Litigation
☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
42 U.S.C. 12117, 42 U.S.C. 2000e-5.

Brief description of cause:

Defendant perceives Plaintiff, a qualified individual, as disabled and is not allowing Plaintiff to work for Defendant.

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23
DEMAND \$ 200,000.00
CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

SHERMAN OSBORN,)	Civil No.
)	
Plaintiff,)	
)	
vs.)	COMPLAINT AND DEMAND
)	FOR JURY TRIAL
)	
BNSF RAILROAD COMPANY,)	
)	
Defendant.)	

COMES NOW Plaintiff, Sherman Osborne, by and through his attorneys, and for his cause of action against Defendant, BNSF Railroad Co., states as follows:

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331 and § 1367. This action arises under and jurisdiction lies pursuant to Section 107(a) of the Americans with Disabilities Act of 1990 (“ADA”), 42 U.S.C. § 12117, which incorporates by reference §706 of Title VII of the Civil Rights Act of 1964 (“Title VII”) and 42 U.S.C. § 2000e-5.

2. Plaintiff Sherman Osborne is a United States citizen and at all times relevant was a resident of Box Butte County, Nebraska.

3. The unlawful employment practices complained of herein were committed within the state of Nebraska.

4. Defendant BNSF Railroad Co. has a registered office in Box Butte County, Nebraska.

5. The Defendant is a “person” within the meaning of § 101 (7) of the ADA, 42 U.S.C. § 12111 (7) and § 701 of Title VII and 42 U.S.C. § 2000e.

6. Defendant is engaged in an industry that affects commerce within the meaning of § 107 (7) of the ADA, 42 U.S.C. § 12111 (7), § 702 of the Civil Rights Act of 1964, and 42 U.S.C. § 2000e.

7. Defendant employs 15 or more employees and is an “employer” within the meaning of § 101 (5) (A) of the ADA and 42 U.S.C. § 12111 (5) (A).

ADMINISTRATIVE PROCEDURES

8. Plaintiff filed timely charges of discrimination with the Equal Employment Opportunity Commission and the Nebraska Equal Opportunity Commission.

9. The Plaintiff has exhausted all administrative remedies available to him.

FIRST CAUSE OF ACTION-DISCRIMINATION

Plaintiff incorporates paragraphs 1-9 above as if fully set forth herein.

10. On March 6, 2002, Plaintiff, Sherman Osborn, was injured in a motor vehicle accident. At the time he worked as an engineer for the Defendant.

11. As an engineer, the Plaintiff’s duties included operating locomotives for the Defendant.

12. After the Plaintiff’s motor vehicle accident, his condition and injuries improved to the point where, on April 6, 2007, he submitted a Medical Questionnaire to the Defendant pursuant to the Defendant’s instructions. The Plaintiff properly followed the Defendant’s return to work procedure.

13. The Plaintiff’s treating physician released him to work as an engineer and/or conductor.

14. The Plaintiff took a functional capacity evaluation which stated that he is able to return to work as an engineer.

15. On April 20, 2007, the Defendant, through a letter signed by Dr. Sharon Clark adopted prior restrictions issued to the Plaintiff in 2004 and refused to allow him to return to work.

16. Since April, 2007, the Plaintiff has been, and continues to be, qualified for the position of engineer and/or conductor. At all relevant times hereto, the Plaintiff performed the duties of an engineer in a satisfactory manner and performed at or above the levels expected by Defendant.

17. At all relevant times, the Defendant has regarded the Plaintiff as an individual with a “disability” as that term is defined in § 3(2) of the ADA, 29 C.F.R. § 1630.2(j)(3)(ii) & (l), 42 U.S.C. §§ 12102(2) and 12111(8).

18. The Defendant perceives the Plaintiff as having a physical impairment stemming from his 2002 motor vehicle accident that substantially limits one or more major life activities. This is established in part by the fact that the Defendant has prevented the Plaintiff from working a wide range of jobs, namely, as an engineer, switchman, or brakeman. Essentially, the Defendant has limited the Plaintiff to work in the light to light-medium range, a classification that eliminates a broad range of jobs despite medical evidence to the contrary.

19. The Plaintiff is a qualified individual with a disability within the meaning of § 101(8) of the ADA, 29 C.F.R. § 1630.2(j)(3)(ii) & (l), 42 U.S.C. §§ 12102(2) and 12111(8), in that the Plaintiff is an individual with a disability who can perform the essential functions of an engineer and/or conductor, yet the Defendant refuses to employ him despite its ability to.

20. Despite the Plaintiff's offers, the Defendant has refused to even discuss options for reasonable accommodation of any perceived disability with the Plaintiff.

21. The Defendant did not engage in the interactive process in good faith.

22. Defendant's actions as described above constitute discrimination against Plaintiff with respect to the terms, conditions and/or privileges of employment under § 102 of the ADA, 42 U.S.C. § 12112, 29 C.F.R. § 1630.2(j)(3)(ii) & (l), 42 U.S.C. §§ 12102(2) and 12111(8).

23. As a direct and proximate result of the Defendant's aforementioned conduct, the Plaintiff has lost compensation and benefits of employment and such losses will continue in the future.

24. As a direct and proximate result of the Defendant's aforementioned conduct, the Plaintiff has suffered, and will continue to suffer, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other non-monetary losses.

25. The Defendant's conduct was undertaken with malice and reckless indifference to the Plaintiff's rights.

WHEREFORE, Plaintiff prays for judgment in his favor on this cause of action against the Defendant for lost wages and other benefits of employment, for compensatory damages, punitive damages, appropriate injunctive relief, front pay, prejudgment interest, attorney's fees and costs, and for such additional relief as this Court deems appropriate.

PLAINTIFF DEMANDS A TRIAL BY JURY AT LINCOLN, NEBRASKA.

DATED this 21st day of June, 2010.

SHERMAN OSBORN, Plaintiff,

By: KNUDSEN, BERKHEIMER
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By: /s/ Jeanelle R. Lust
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